

From: Andrew Puplis
To: Microsoft ATR
Date: 1/27/02 4:38pm
Subject: Microsoft Settlement

Renata B. Hesse
Antitrust Division
U.S. Department of Justice

Dear. Ms Hesse:

This comment is in response to proposed Settlement between the US Department of Justice and participating states, and Microsoft. For the following reasons, the settlement should be rejected

Section 3(b) only covers the top 20 OEM's. All other OEM's are not subject to pricing protections. This appears to create a high market entry barrier.

Section 3(c)(1): Allows Microsoft to prevent the display of Middleware icons, menus, etc. by other manufacturers as long as they similarly prohibit their own display of Middleware. This exception essentially allow Microsoft to maintain the status quo by disallowing other middleware manufacturers from displaying their icons. Consumers not aware of another choice will choose Microsoft.

Section 3(c)(2) Allows Microsoft to prevent the display of non-Microsoft middleware displays if they do not impair the functionality of the user interface. However, the decision if the user interface is impaired seems to be left up to Microsoft to determine.

Section 3(c)(3) requires that non-Microsoft Middleware providers make their icons of a similar size and shape as Microsoft's. This restriction seems to rekindle Microsoft's attempt to obtain copyright protection on utilitarian aspects of the windows interface. This the exact opposite claim they made in Apple vs.. Microsoft. In addition, this requirement seems to expose middleware manufacturers to potential claims for copyright and trade dress violations.

Section 3(c)(5) requires that the OEM comply with reasonable technical specifications established by Microsoft. Has Microsoft published or otherwise released these technical specifications? What is to prevent Microsoft from creating specifications that hinder the operability of another operating system and defend those actions as reasonable for the functionality as they have historically done to prevent Non-Microsoft Middleware?

Section 3(e) requires the availability of a communications protocol to allow interoperability with Windows. This won't be made available for another nine months after the submission of the proposed final judgment. Nine months in computer industry is an eternity. Microsoft has already shown its aggressiveness in this area. Allowing a nine month "buffer" before communications protocol is made available will give Microsoft additional time to shore up a monopoly over Middleware. In addition, the settlement agreement fails to provide the conditions under which the communications protocol. It is assumed that it will be provided under a confidentiality agreement. However, Microsoft may institute more restrictive terms under the guise of security that will render the availability moot. Indeed, other portions of the Settlement allow Microsoft to withhold information based on security concerns. This leaves Microsoft with the ability to restrict communication protocols to the point that they are useless.

Section 3(h)(3) Allows Microsoft to alter icons, start menus, etc. of non-Microsoft Middleware providers 14 days after bootup of a new PC. Most computer users are not technically proficient to understand the impact of changing the Middleware applications that lets them browse the internet, view pictures, play music, etc. In addition, 14 days may not be long enough for a new computer user to understand what middleware is and how it interrelates with what they view, listen to, etc.

section 3(h) allows Microsoft to prevent non-Microsoft Middleware from contacting Microsoft Servers. This section essentially eliminates the force of the Settlement. Users who normally use Non-Microsoft Middleware must use Microsoft Middleware (including web browsers) in order to contact Microsoft for updates, security patches, or other information from Microsoft. Because of Microsoft's lackluster security, contacting Microsoft's servers is almost a weekly event. Users will eventually choose the path of least resistance because of the need to constantly contact Microsoft servers. It seems that Microsoft's lack of security can be used to their advantage. In addition, this section fails to address Microsoft's .NET strategy (which will likely be defined as outside the context of general web browsing by Microsoft). This Settlement should act prospectively to prevent future harm, not retrospectively to address issues that are already moot.

Section 3(h) Also allows Microsoft to prohibit Middleware that fails to implement a reasonable technical requirement. This section allows Microsoft to prohibit any Middleware that it doesn't like. Meaning, that Microsoft can require the Middleware to use proprietary Microsoft technology for which it may charge additional (and perhaps cost prohibitive) fees. This also, has the side effect of allowing Microsoft to further close competition in the computer industry by imposing proprietary technology.

Section 3(h) allows Microsoft to refuse to disclose API's or Communications Protocols to those may compromise the security, anti-virus, anti-piracy, etc. This term allows Microsoft to refuse to provide API's or Communications Protocols under the guise of security, functionality, or rights protection. Again Microsoft could utilize this provision to refuse to provide Communication Protocols to potential Middleware competitors using these excuses.

Section 3(h) also leaves it up to Microsoft who may obtain the API's and Communication Protocols. In addition, Microsoft may test the proposed Middleware for compatibility. However, there seems to be no procedure and standard for evaluating what Microsoft can choose to reject and on what grounds. The vague term "functionality" has been used throughout this Settlement without definition other than that Microsoft gets to decide what it is.

General Comments:

Many terms of the Settlement leave it up to the reasonableness and discretion of Microsoft. This seems foolhardy because the very reason this lawsuit and proposed Settlement exist is because Microsoft has historically acted unreasonably and in bad faith against potential competitors. Therefore, leaving so many decisions to the discretion of Microsoft with regard to what their competitors may or may not do is (for lack of a better term) idiotic. In addition, their stall tactics and unreasonableness in court proceeding indicate they will stretch the Settlement terms to their logical extremes in order to continue to operate "business as usual."

It seems that the Department of Justice's stance on the Microsoft case has changed with the changing of Presidential administrations. The Court of Appeals has ruled Microsoft a Monopoly, yet the Settlement terms are surprisingly light on Microsoft and don't address prospective behaviors. It leaves most

important decisions to Microsoft and limits who may enforce the Settlement to the Department of Justice, whose it under scrutiny from the industry and political organizations alike. Indeed, a non-profit Antitrust group may be filing suit because Microsoft and the Department of Justice failed to disclose all communications regarding the proposed Settlement. In addition, private organization are filing suit against Microsoft (e.g. Netscape) because they view the settlement as ineffectual. While these allegations may or may not be true, these facts raise suspicions that the term of the Settlement was politically motivated or improperly obtained by Microsoft.

Finally, the Settlement contains so many ambiguous terms and loopholes that additional lawsuits will be inevitable. However, this Settlement will limit those suits and who can bring them without addressing the illegal conduct of Microsoft.

Respectfully Submitted,

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